COMPLIANCE BOARD OPINION NO. 94-7

August 16, 1994

Mr. Tom Marquardt
Capitol-Gazette Newspapers

The Open Meetings Compliance Board has considered your complaint dated June 29, 1994, regarding the June 27, 1994, meeting of the board of directors of the Crofton Civic Association.

Your complaint asserts that the board of directors "voted to close the [June 27] meeting to the public and media to discuss a legal aspect of a petition drive to change the legislation that created the tax district. The association's counsel was not present, but copies of a three-page advisory letter from him [were] presented to the board during the executive session." Your complaint alleges that the presiding officer failed to cite any provision of the Open Meetings Act that would authorize the closing of the meeting. Your complaint also asserts that no minutes were taken during the closed session. You further contend that none of the exceptions in the Act justified the closing of the meeting and that, even if a discussion of the legal advice letter could permissibly be conducted in closed session, the board's discussion appeared have gone beyond that stated reason for holding the closed session and touched on "the merits of the petition that will need voter approval. General discussion of the petition is not protected by the Open Meetings Act." Finally, your complaint states that the association's president "declined to disclose the contents of the attorney's letter or any discussion that took place on its contents."

In a timely response on behalf of the board of directors, Frederick C. Sussman, Esquire, asserted that the discussion by the board in closed session concerned an "executive function" and was therefore beyond the scope of the Act. Even if the Act applied, Mr. Sussman continued, "the board still was authorized to enter closed session to discuss confidential communications and legal advice received from its attorney." Finally, if any violations of the Open Meetings Act did occur, "the errors did not compromise the public's `right to know' and were *de minimis*."

A threshold question is whether the Board of Directors of the Crofton Civic Association is a "public body," within the meaning of §10-502(h). Although the association is a private, non-profit membership corporation, its role in administering the special community benefit taxing district in Crofton is established by county ordinance. *See* Article 6, §§2-102(e) and 2-104(i)(2)(vi) of the Anne Arundel County Code. You assert in your complaint that the board of directors of the association is a "public body," and in its response "the

Board chooses not to ... argue this issue now." Hence, without exploring the issue further, the Compliance Board will act on the premise that the association's board of directors is a "public body."

Since the board of directors was concededly holding a "meeting" on June 27, the Act would apply unless the board of directors was engaged in an "executive function" at that meeting. An executive function is not covered by the Act. §10-503(a)(1)(i).[1] Because a determination about the executive function exclusion can be made only in light of the particular nature of the discussion, we shall quote at length Mr. Sussman's characterization:

> The Board was deliberating to determine whether, and in what manner, to initiate a petition drive within the Crofton community to urge the Anne Arundel County Council to amend the purpose of the Crofton special taxing district. This is not a function or responsibility which is vested by law in the Association as administrator of the Crofton special taxing district. Rather, this is an activity which the Board chose to undertake in the same manner as could have been organized or undertaken by any other person, group of persons, or organization. The submittal of the requisite number of petition signatures to Anne Arundel County is only the beginning of a lengthy legislative process by which the County Council ... may amend the purpose of the taxing district.

The board of directors argues persuasively that this discussion does not fall within the definitions of any of the other defined "functions" enumerated in the Act – that is, the discussion was not an "advisory function," a "judicial function," a "legislative function," a "quasi-judicial function," or a "quasi-legislative function." *See* §10-502(b), (e), (f), (i), and (j). The Compliance Board agrees; the discussion fits within none of these definitions.

The board of directors then concludes that, because the discussion fits within none of these defined functions, it must be deemed to be an executive function and therefore beyond the scope of the Act. The Compliance Board does not accept that this conclusion follows from the board of directors' premise. As the Attorney General has pointed out, an analysis of whether an activity falls within one of the other defined functions is the beginning, but not the end, of an inquiry into the executive function exclusion. That is, if an activity *does* fall within one of the other defined functions, then the activity cannot be an executive function. *See* §10-502(d)(2). But it does not necessarily follow that an activity outside the other defined terms is perforce

[1] The board of directors was assuredly not carrying out a quasi-judicial function, which is also outside the scope of the Act.

an executive function. The activity must still meet the central definition of "executive function" itself – that the activity involve "the administration of ... a law ...." §10-502(d)(1). *See* 78 *Opinions of the Attorney General* ___ (1993) [Opinion No. 93-028 (July 28, 1993)].

In the view of the Compliance Board, a discussion of whether to launch a petition drive so as to amend the purpose of a special taxing district is not "the administration of a law." Indeed, the board of directors points out that its deliberations about initiating the petition is "not a function or a responsibility which is vested by law in the Association as administrator of the Crofton special taxing district." The Compliance Board concludes that this discussion did not fall within the executive function exclusion.

In short, the discussion fell within *none* of the six functions defined in the Act. But just as the universe of subatomic particles probably contains particles as yet undetected, so the universe of activities subject to the Open Meetings Act contains functions that are undefined by the Act. The Act states that, "Except as otherwise expressly provided in this subtitle, a public body shall meet in open session." §10-505. If a discussion fits within none of the functional definitions of the Act, then the discussion is subject to the Act.[2]

The board of directors contends that, even if the Act applied to the June 27 meeting, it was authorized to close the meeting pursuant to §10-508(a)(7), which permits a closed session to "consult with counsel to obtain legal advice." In a prior opinion, the Compliance Board has taken the position that if the counsel to the public body is not present at the meeting, this exception is inapplicable. *See* Compliance Board Opinion 93-6 (May 8, 1993). Because the counsel to the association was not present at the June 27 meeting, this exception could not properly have been invoked. A letter from Mr. Sussman is not a sufficient substitute.

That the topic of discussion was a letter of advice from counsel also figures prominently in the board of directors' alternative argument that a closed session was legally justified. The board of directors contends that §10-508(a)(13), which permits a closed session to "comply with a specific constitutional, statutory, or judicially imposed requirement that prevents public

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[2] Prior to the 1981 amendments, the scope of the Act was dominated more narrowly: It applied to advisory, legislative, and quasi-legislative functions. It did not apply to executive, judicial, and quasi-judicial functions. *See* former §§10-503 and 10-504. The assumption of the drafters of the original Act, presumably, was that every activity of a public body could be categorized as one of these six defined functions. Under this structure of the Act, the executive function could well be seen a residuary category covering everything that was not otherwise defined within one of the other functions. But the amended Act sets out the more open-ended concept of applying to whatever a public body does, unless the activity in question is within the exclusions for executive, function, judicial, and quasi-judicial functions.

disclosures about a particular proceeding or matter," applies when a public body is discussing a document that falls within the attorney-client privilege.

There may well be merit to this argument. The Compliance Board doubts that the General Assembly intended to compel a public body to waive a privilege that is firmly rooted in the common law and codified in §9-108 of the Courts and Judicial Proceedings Article.

The Compliance Board need not decide this question, however, because this exception was not invoked by the board of directors prior to the closing of the session. While the president of the association apparently referred to legal matters that would be discussed at the closed session, there was neither an articulation of the attorney-client privilege as the basis for the closing of the session nor a reference to the specific provision of the Act that is now invoked to justify the closing. The Compliance Board has taken the position that it will not entertain after-the-fact justifications for closing a meeting that were not presented contemporaneously, as the Act requires. *See* Compliance Board Opinions 93-11 (November 30, 1993) and 94-5 (July 29, 1994).

Moreover, it appears to the Compliance Board from both the letter of complaint and the response that the discussion of the board of directors went beyond whatever advice was conveyed in the privileged letter from counsel. The response of the board of directors confirms that it was discussing "whether, and in what manner, to initiate a petition drive ..." and "thereby to seek legislative relief ...." While we do not doubt that the legal advice conveyed in the letter from counsel played a part in that discussion, given this description it seems to the Compliance Board likely that the board of directors extended its discussion in closed session beyond the points of legal advice contained in counsel's letter. To the extent that the discussion went beyond a discussion of the privileged letter itself and dealt with the broader policy issue of the board's involvement in the petition drive, then the exception in §10-508(a)(13) would not have justified closing all of the discussion, even had the exception been properly asserted in the first place.

The Act also imposes certain procedural requirements concerning a closed session. One is that a written statement be made prior to the closing of the session, in which the presiding officer states the reason for closing the meeting, a citation of the authority under the Act to close the meeting, and a listing of the topics to be discussed. §10-508(d)(2)(ii). While the association president did make an oral announcement as to the nature of the impending closed session, the required written statement was evidently not prepared. In this respect, the procedures of the Act were not complied with.

In your complaint, you indicated that "no minutes were taken during the executive session." The board of directors asserts that minutes were indeed taken, although the minutes were not supplied to the Compliance Board because of their confidential nature. The Compliance Board has no basis for finding a violation of the requirement of §10-509(b), which requires that minutes be kept. It is not clear, however, whether there was compliance with the separate requirement in §10-509(c)(2) that the minutes of the next open meeting of a public body contain certain information about the prior closed meeting. The Compliance Board expresses no opinion on this matter.

The board of directors urges that any violations of the Open Meetings Act that it might have committed were done in good faith, without any intent to frustrate the public's "right to know." The Compliance Board does not intend to cast doubt on the good faith of the board of directors. Our job is to assess whether the Act was fully complied with. Even those who act in good faith might violate the Act, and, for the reasons explained above, the board of directors did so.

OPEN MEETINGS COMPLIANCE BOARD

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